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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re the Marriage of JAYRAJ and BINDU NAIR.	
JAYRAJ NAIR, Appellant, v. BINDU NAIR, Respondent.	C061097/C062004 (Super. Ct. No. SDR26925)

This is a contentious child custody dispute. We recently affirmed orders made by the Superior Court on June 8, 12, July 8, and August 20, 2008, which provided for supervised visitation by Jayraj Nair (father) of his younger son, Sujay, and required father to pay $75,000 in attorney fees and costs to Bindu Nair (mother). (*Marriage of Nair* (Dec. 29, 2009, C059661) [nonpub. opn.].)

While the prior appeal was pending in this court, the custody battle continued apace in the Superior Court. On December 11, 2008, the trial court denied father's motion to reduce his child support obligation and to obtain mother's

reimbursement of expenses incurred for education-related activities of the parties' older son, Suraj. On March 13, 2009, the trial court granted mother's request for a restraining order against father under the Domestic Violence Prevention Act (DVPA). (Fam. Code, § 6200, et seq.)[1]

In this appeal, father challenges the December 11, 2008, and March 13, 2009, orders. He contends the trial court erred by (1) requiring him to pay child support to mother for Suraj even though the child resided with father 100 percent of the time, (2) denying his request that mother reimburse him for the costs of Suraj's lessons in chess and Indian music and enrollment in a gifted student learning program, (3) issuing a DVPA restraining order that prevents him from contacting mother, Suraj, and Sujay (except for short supervised visits) for one year based on the trial court's finding that father had emotionally alienated Suraj from his mother.

We reject father's first contention but find merit in his second and third arguments. Accordingly, we reverse the trial court's order denying father's request for reimbursement of Suraj's education-related expenses as well as the DVPA restraining order.

FACTUAL AND PROCEDURAL HISTORY

Child Support

The legal battle for custody, visitation, and child support began on February 1, 2006, when mother sought a DVPA restraining

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[1] Undesignated statutory references are to the Family Code.

order against father. In her request for a restraining order, mother sought protection for herself and the parties' two sons: Suraj (born in July 1996) and Sujay (born in December 2003). On February 24, 2006, father petitioned for dissolution of marriage. The domestic violence matter and family law case were consolidated.

Following a March 28, 2006, hearing, the trial court ordered: "Children to participate in all activities in which they have been previously enrolled including chess and Indian music." On July 10, 2006, the court ordered father to pay $1,114 per month in child support to mother. The child support order was based on father having both children 30 percent of the time.

Nearly every month, the parties filed another motion regarding issues of custody and visitation.

In August 2006, Suraj went to live with his father, and Sujay remained with his mother. Throughout the time relevant to the issues in this appeal, Suraj lived with his father and Sujay remained with his mother. During the same time, the parties persisted in filing numerous motions regarding custody and visitation.

In February 2008, trial was conducted on the issues of custody and visitation. In March 2008, the court issued a ruling in which it awarded the parents joint legal custody and found that the long-term best interests of the children required joint physical custody. However, Suraj's alienation from his mother required therapy to repair that relationship. The court

also incorporated the recommendation by a court-appointed evaluator that the "children shall be allowed to continue the social and athletic activities in which they presently participate and those which may commence in the future. The parents need to coordinate before signing the children up for such activities. Each parent shall provide the other with notices of any sporting or extracurricular activities including practice schedules, game schedules, and tryouts." The court additionally ordered that "by the fifteenth (15th) of each month, each parent shall provide a schedule of activities planned for the following month to the other parent."

The ruling after trial was served on April 1, 2008. Within weeks, father and mother filed motions regarding issues of custody and visitation.

On May 7, 2008, father filed an order to show cause seeking child support from mother in the amount of $1,646 per month for Suraj (plus $1,056 per month in arrears for the prior calendar year). Father sought the support for Suraj's enrollment in chess and Indian music classes as well as Stanford University's Educational Program for Gifted Youth.

On May 15, 2008, the court granted a request by mother that father be limited to supervised visitation of Sujay. The court also ordered the children to have no contact with each other until a therapist was assigned to Sujay.

On June 8, 2008, an order was filed to reflect an earlier ruling that denied father's objections to and request for

clarification of the ruling after the custody trial. The order also substituted therapists for the children.

On June 12, 2008, the order limiting father to supervised visits with Sujay was filed. During the remainder of the month, mother and father filed requests and orders to show cause in which each accused the other of undermining parental rights.

On July 8, 2008, the trial court confirmed its earlier visitation orders, again replaced therapists for the children, and ordered father not to contact mother.

In August 2008, mother filed a responsive declaration to father's request for $1,646 per month in support for Suraj. Mother asserted that father had been alienating Suraj against her. She requested that support be calculated based on her having Suraj 50 percent of the time and Sujay 100 percent of the time. Mother also argued that "arrears" should not be ordered because the court had not previously required her to pay anything to father. Other than focusing on father's conduct, mother did not claim that any of the expenses claimed for Suraj's activities were improper or that she objected to Suraj's participation in any of them.

On August 20, 2008, the trial court held a hearing on father's request for support and reimbursement. The same day, the trial court ordered father to pay to mother $75,000 in attorney fees as a sanction for increasing the cost of litigation.

On December 11, 2008, the trial court issued an order that (among other things) denied father's requests for child support

and continued his obligation to pay $1,114 to mother for Suraj. Father's support obligation was based on the trial court's finding that "to the extent mother is not exercising her 50% parenting time with the older child, this is due solely to father's misconduct in alienating the older child from his mother and failing to take all necessary steps to reunify the older child with his mother consistent with the [*sic*] all parenting orders in effect."

Father timely filed a notice of appeal from the December 11, 2008, order.

DVPA restraining order

On May 29, 2008, mother filed a motion to remove Suraj from father's custody. On June 9, 2008, the trial court denied the motion without prejudice and noted: "The proper remedy for enforcement of the court's orders is an [order to show cause] in re contempt; removal of Suraj from father's custody is within the jurisdiction of county counsel's office by way of a Welfare and Institutions Code section 300 proceeding."

On February 11, 2009, an ex parte hearing was held on mother's request for a DVPA restraining order to prevent contact with her, Suraj, and Sujay by father. The court granted a temporary restraining order until a hearing scheduled for March 2, 2009.

Father was served with the temporary restraining order during a hearing on February 20, 2009. While father was in court during the hearing, Suraj was taken from father's home in handcuffs and placed in the Sutter Center for Psychiatry in

Sacramento. Suraj was disallowed from having any contact with his father, teachers, friends, or neighbors. Suraj remained at the psychiatric facility until March 3, 2009, when he was released to his mother.

On March 10, 2009, father and mother attended a hearing on the request for a permanent DVPA restraining order. Mother testified that father was physically abusive toward her in 1996 and 1997. During 1996, father kicked Suraj. Mother also reported that Sujay told a therapist that father threatened to kill or hurt her. Mother testified that father's anger issues caused her to fear for her safety and the safety of the children. During the hearing father (acting in pro per), cross-examined mother as follows:

"Q. Have you ever seen me intimidate or hit or physically abuse any of the children?

"A. Yes.

"Q. When was that?

"A. Several times when we were together you spanked the kids, I have spanked the kids. You have emotionally abused Suraj even when we were together in the marriage to take sides. Bad-mouthed mom, mom's family. Made him tell lies about -- during the evaluation about physical and sexual abuse [by the maternal grandfather]. You have not taken him for counseling as was recommended by every counselor, five or six that have been in this case. Everybody has been counseling [*sic*] once or twice a week. Everybody has encouraged that [*sic*] he have a good

relationship with his mother and child and you have not supported that."

Mother called Dr. Janelle Burrill, who had been appointed by the court to serve as a reunification therapist. Dr. Burrill testified that Sujay reported a threat by father to kill mother. Dr. Burrill also testified that she believed father remained a threat to mother's safety, lacked impulse control, suffered unstable moods, lacked empathy, and exhibited sociopathic behaviors. Mother also introduced Dr. Burrill's supplemental reunification report, dated February 6, 2009. The report stated, "I usually do not find many allegations of domestic violence in Family Law to be valid, particularly at the time of dissolution. In this case, I have witnessed behaviors of the person Mother and Minor lived with and they are not normal and anyone could be at risk who gets in his way. Father presents a serious risk of physical harm to Mother and to minor Suraj and probably Sujay, if he has contact. After all Father has told both Minors **mom is to be killed**."

On March 13, 2009, the court granted mother's request, and a DVPA restraining order was filed on March 25, 2009. The order prohibited father from having any contact with mother or Suraj for a period of one year. Father was allowed supervised visitation of Sujay. Father was required to turn in his passport as well as those of the children.

An attachment to the restraining order notes, "The evidence on which the court relies is contained in the reports of Dr. Burrill and the comments of other court-appointed therapists in

this case, as well as the following evidence: testimony of Kelly Graham regarding the child's extreme reaction to mother's presences on the child's school campus; evidence of father not fully complying with court orders reflecting lack of commitment to engage in the counseling and reunification program laid out by the court; evidence of father's desire to control things by taking Suraj to an unauthorized therapist, by using father's own doctor for a psychiatric evaluation instead of relying on neutral court evaluators, by extremely inappropriate conduct in having Suraj pay for his own counseling sessions, and by evidence that father has not undertaken any supervised visitation with Sujay Nair. [¶] . . . [¶] The court reaffirms that it is not in the best interests of Suraj Nair for father to have any contact at this time. The court finds that contact between father and Suraj will substantially undermine the therapeutic efforts that are being undertaken. The court clearly finds that contact by father with Suraj is not in the child's best interests. The court further finds that it would be detrimental to Suraj's interests if contact by father with Suraj was allowed."

Father timely filed a notice of appeal from the trial court's issuance of the DVPA restraining order. On September 10, 2009, we ordered the appeals in C061097 and C062004 consolidated for purposes of argument and decision.

DISCUSSION

I

Order Requiring Father to Pay Child Support for Suraj to Mother

Father contends the trial court erred by requiring him to pay child support to mother for Suraj when the child was living with him 100 percent of the time. We disagree.

A

We begin by considering mother's assertion that a child support order entered on November 21, 2008, renders father's present appeal moot.

The November 21, 2008, order provides that "child support remains as previously set. Child support calculation is a deviation from guideline based on alienation." Although the court allowed mother to withdraw her request for payment of child support arrears, the November 21 order continued the trial court's determination that father could be ordered to pay child support based on his role in his son's estrangement from his mother. Father's appellate challenge to this basis for child support is not mooted by the trial court's adherence to the same reasoning he claims to constitute a violation of the statutes authorizing child support.

Moreover, as father points out, the November 21, 2008, order was entered before the December 11, 2008, filing of the order he challenges in the present appeal. Although the order being challenged on appeal was made from the bench on August 22, 2008, it was not entered as a written order until after the November 21, 2008, order that mother contends moots this appeal.

As a later-entered order, the December 11, 2008, order was not superseded as mother contends. Father's appeal of the child support order is not moot.

Mother next argues that father's appeals should be dismissed because "[a] reviewing court has the inherent power to dismiss an appeal by any party who has refused to comply with trial court orders." On this point, the California Supreme Court has explained that "although the discretionary power to dismiss with prejudice has been upheld in this state, its use has been tightly circumscribed." (*Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 916.) Dismissal as a remedy for halting compliance with court orders competes with the policy favoring resolution of legal issues on the merits. For this reason, the Supreme Court's decision in *Lyons v. Wickhorst* "limits its exercise to 'extreme circumstances' of deliberate misconduct when no lesser sanction would be effective to cure the harm." (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 760.)

Mother asserts that father's noncompliance with trial court's orders compels dismissal. Her contention is forfeited for failure to cite any example of father's noncompliance with the trial court's orders. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["An appellate court is not required to examine undeveloped claims, nor to make arguments for parties"]; Cal. Rules of Court, rule 8.204(a)(1)(C) ["Each brief" is required to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the

record where the matter appears"].) We will not search through the volumes of the present or prior consolidated appeals and petition for writ of mandate that comprise the record in this matter in order to determine whether father's conduct was sufficiently egregious to warrant the extreme sanction of dismissal. (*Paterno v. State of California, supra,* at p. 106.)

B

On July 10, 2006, the trial court ordered: "Child support is payable from father to mother at $1114.00 a month commencing 5-9-06, retroactively retaining jurisdiction back to this date." The order was based on an assumption that father would have both sons 30 percent of the time. On August 16, 2006, the court ordered that father have both sons with him on alternate weekends from Thursday after school until the start of school on Monday. That same month, Suraj ran away from mother's home and went to live with father -- where he would remain during the entire time relevant to this issue.

Two years later, at the hearing on father's motion to modify child support, father argued: "I am not obligated when my child is living with me to pay someone expenses for taking care of him. It's very simple as far as my understanding of the law is custodial time and income are the two primary [considerations]." The trial court found that Suraj lived with father 100 percent of the time during the period relevant to this issue. Neither party disputes this finding.

In ordering father to pay child support to mother for Suraj, the trial court found "that this is an unusual case"

requiring deviation from guideline child support. In later confirming the order, the trial court further explained:

"Now, [section] 4057(b)(5) allows the Court broad discretion when special circumstances apply. And those circumstances are not all specifically delineated in the section.

"And quite frankly, I've done the research. I can find no cases that apply specifically to the facts of this case. But let me explain to you my rationale.

"As all the reports have indicated, Mr. Nair, and I don't intend to disparage you in any way. My conclusions of all the reports I've said countless times in the past has indicated a clear pattern of alienation on your part with respect to your oldest child and his relationship with his mother. It's been now over two years since he's had any contact with his mother. So all of the orders have emanated from the continued pattern of alienation which has permeated the proceedings.

"So rather than fixing child support based on the actual time share at this point in time, I feel it would be inappropriate and unjust to reward the alienating parent with an award of support by virtue of conduct which has allowed that child to remain exclusively in his or her care.

"So I think there should be an incentive -- this is a special circumstance in this case. I think there should be an incentive for both parents to promote frequent and continuing contact between the children and the other parent and that incentive in this case, I believe, can be served in not

rewarding the alienating parent with an award of child support but instead to indicate to the parent that, No. That's not right. That's not appropriate. Court orders need to be followed. Reunification process needs to commence. And if I look at the numbers, and I've looked at them again, Mr. Nair, the fact of the matter is your conduct has directly caused zero visitation with mother with respect to your oldest child when in fact she should be having 50 percent, half the time. That's what the previous orders were.

"[¶] . . . [¶]

"So for the purpose of computing child support in this case and utilizing the provision of Family Code section 4057(b)(5) I'm using a 50 percent time share between mother and Suraj."

C

Father contends the Family Code statutes governing child support payments preclude an order requiring a parent with primary or sole physical responsibility for a child to pay support to a parent spending little or no time with the child. As father points out, the Family Code does not use custody or visitation percentages in calculating the amount of child support to which a child is entitled. Instead, the statewide uniform guidelines use the concept of "physical responsibility" for the child to reflect the fact that a child may be spending much more time with a parent than the custody or visitation orders might suggest. As a leading family law treatise explains:

"Adjustment [in child support is] tied to 'physical responsibility' rather than 'custody': The time-sharing adjustment is based on the parents' respective periods of primary physical 'responsibility' for the children rather than physical 'custody.' Use of this terminology is purposeful: i.e., to clarify that § 4050 et seq. is not intended to alter current child custody law in any manner (no struggle for 'custody' is necessary to apply the statutory formula). [Summary of SB 1614 (Hart) (1991–1992 Reg. Sess.); *Edwards v. Edwards* (2008) 162 CA4th 136, 144 (citing text); *DaSilva v. DaSilva* (2004) 119 CA4th 1030, 1033 (citing text); *Marriage of Katzberg* (2001) 88 CA4th 974, 981, (citing text)] [¶] For purposes of calculating the H% factor, hours of 'primary physical responsibility' and hours of 'custody' are not per se interchangeable. [*DaSilva v. DaSilva*, supra, 119 CA4th at 1036, 15 CR3d at 63]." (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶ 6:168, p. 6-67, italics and first brackets added.) Thus, a parent who has been awarded a small "physical custody" percentage may be entitled to child support based on a showing that the parent exercises primary physical custody of the child for substantial portions of time.

Mother argues that the trial court was allowed to deviate from guideline child support pursuant to the exception stated in section 4055. Subdivision (b)(1)(D) of section 4055 allows for child support to take into account situations in which a parent "*will have* primary physical responsibility" for the supported child. (Italics added.) Mother notes that she would have had a

substantial amount of physical responsibility for Suraj but for father's failure to comply with court-ordered reunification efforts.

Mother's argument is supported by the record, which shows that the trial court issued a custody and child support order on July 10, 2006. In that order, the trial court required father to pay $1,114 to mother based on the anticipation that father would have both children 30 percent of the time. Soon after entry of the July 2006 order, Suraj ran away from his mother and began living only with his father. Although Suraj's home changed, nothing changed in the court's child support order until father moved to modify it in May 2008.

Father did not move for modification for nearly two years after Suraj went to live with him. Instead, father discouraged reunification between Suraj and his mother; in addition, father simply did not pay child support as required by July 2006 order. Father does not deny the validity of the order.

Father may not escape a valid child support order by ignoring it and then seeking retroactive cancellation of its support obligation. Even though father's claim of primary physical responsibility for Suraj is true, "he who seeks equity may not take advantage of his wrong . . . ." (*In re Marriage of Popenhager* (1979) 99 Cal.App.3d 514, 523.) We cannot excuse father's shirking of his responsibilities imposed by a valid order on the basis of his noncompliance. Father cannot frustrate mother's custodial time with Suraj and then claim a reduction in child support on the ground the mother did not have

parenting time with the child. Accordingly, we reject father's argument that the trial court erred in requiring him to pay support according to a previously entered and unchallenged child support order.

II

Denial of Reimbursement for Mother's Share of Suraj's Education-Related Activities

Father next contends the trial court erred in failing to order mother to reimburse him for half the expenses he incurred for Suraj's lessons in chess and Indian music as well as his enrollment in a gifted child education program. We find merit in the contention.

A

On May 10, 2006, the trial court issued an order instructing: "Children to participate in all activities in which they have been previously enrolled including chess and Indian music." On July 10, 2006, the trial court ordered that "[a]ny tuition expenses, out of pocket therapy expenses, counseling expenses and half of uncovered medical expenses are to be split equally" by the parents.

At the August 20, 2008, hearing on support, father explained that Suraj had been engaging in chess and Indian music since 2005 -- before the trial court ordered that the children should continue their ongoing activities. Father reminded the court that Suraj's chess and Indian music teachers testified regarding the ongoing lessons during the trial in February 2008.

As to the Stanford University online education, father stated that Suraj had been enrolled since 2003. Father further explained, "It's not extracurricular. It's a school curriculum. You cannot treat it as a second. It's his primary activity."

Father stated that he informed mother of Suraj's continuing education-related expenses, and that mother never objected. Mother's counsel countered with an offer of proof that mother had not discussed the matter with father or given her approval for the expenses.

The court denied father's request, explaining: "So the fact at trial [father's] advising mother of certain activities that [father has] chosen to involve [Suraj] in violates the clear mandates of joint legal custody." The court further stated: "So it would be as if the shoe were on the other foot. If it was mother, you know, who was making choices with respect to your child and advising you after the fact, that equates to essentially no right to reimbursement for any of those expenses that are incurred, even if they're in the best interest of the child. [¶] . . . [¶] And so clearly I think it's inappropriate in a law and motion context for me to make any orders for reimbursement at this point in time absent some reunification process."

B

Neither party disputes that the trial court had discretion to make the May 10 and July 10, 2006, orders that initially

required the parents to split education and extra-curricular costs equally.

The Family Code provides that "[t]he court shall order the following as additional child support: [¶] . . . Costs related to the educational or other special needs of the children." (§ 4062, subd. (b)(1).) The Family Code further sets forth a presumption that the parents should share equally in such expenses: "If there needs to be an apportionment of expenses pursuant to Section 4062, the expenses shall be divided one-half to each parent, unless either parent requests a different apportionment [according to the formula set forth in] subdivision (b) and presents documentation which demonstrates that a different apportionment would be more appropriate." (§ 4061, subd. (a).)

We review father's argument that the court misconstrued its earlier support orders in denying him reimbursement for Mother's share of Suraj's expenses under the de novo standard of review. "The same rules apply in ascertaining the meaning of a court order or judgment as in ascertaining the meaning of any other writing. (*Verner v. Verner* (1978) 77 Cal.App.3d 718, 724.)" (*Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1205.) The interpretation of a judgment or order's meaning presents a question of law for us to resolve. (*Ibid.*; see also *John Siebel Associates v. Keele* (1986) 188 Cal.App.3d 560, 565.)

The May 10, 2006, order required both parents to continue the children's activities in which they were already participating. The July 10, 2006, order imposed the

responsibility on the parents to share equally in their children's educational expenses.

Father's testimony established that the expenses for Suraj's chess and music lessons and Stanford enrollment arose from activities in which the minor was already participating prior to May 2006. Consequently, the trial court erred in ruling that it lacked jurisdiction to order reimbursement to father for the expenses he claimed for Suraj. Father incurred these expenses consistent with the trial court's earlier May and July 2006 orders.

Mother argues that "it was Father's obligation to confer, consult and reach agreement with Mother *before* incurring the educational and other costs for which he sought reimbursement." Citing the example of *Enrique M. v. Angelina V.* (2009) 174 Cal.App.4th 1148, mother argues that the proper recourse for failure of parents to agree on expenses is to file a motion. In *Enrique M.*, father filed a motion to enroll his child in a particular school that allowed both parents to participate in the child's educational activities. (*Id.* at p. 1151.)

We agree with mother that a motion would have been the proper manner to challenge the propriety of the court-imposed obligation to pay for Suraj's chess, music, and Stanford expenses. However, the propriety of a motion to change a parent's obligation to pay for Suraj's expenses undermines, rather than supports, mother's argument. Father incurred Suraj's expenses in harmony with the May and July 2006 orders. Had mother objected to the continuation of her son's activities,

it was *her* burden to seek modification of extant orders. Father was not required to secure continuing approval from mother for expenses incurred pursuant to the court's earlier orders.

Mother also resorts to castigation of father's conduct as reason to excuse her obligation to pay for Suraj's expenses. As we have already noted, the record shows that father undermined efforts to reunite Suraj with his mother. However, mother's responsibility for Suraj's expenses was not excused by father's obstinacy. On this point, we find instructive the case of *In re Marriage of Tavares* (2007) 151 Cal.App.4th 620 (*Tavares*). In *Tavares*, the mother of a minor child sought to compel the father to pay overdue child support. (*Id.* at p. 625.) The trial court ordered payment of the overdue support, and the father appealed. On appeal, the father argued that he should not be responsible for child support during a time that the mother concealed the minor in Montana. (*Ibid.*) The *Tavares* court rejected the contention, holding that the mother's misconduct provided no "defense to payment of arrears for a child who is still a minor because the overdue support will still benefit the child." (*Ibid.*, citing *In re Marriage of Comer,* (1996) 14 Cal.4th 504, 515-517.) In *Marriage of Comer*, the California Supreme Court held that a child support obligation "runs to the child and not the parent." (*Id.* at p. 517.)

Here, mother does not dispute that the expenses were incurred in Suraj's best interests. Withholding repayment for court-ordered expenses did nothing to benefit Suraj. The trial

court should have ordered father's reimbursement for one-half of expenses incurred consistent with its earlier orders. (*Tavares, supra,* 151 Cal.App.4th at p. 625.) Accordingly, we shall reverse the order denying father's request for reimbursement of expenses incurred in compliance with the May 10 and July 10, 2006, orders.

III

DVPA restraining order

Father contends the trial court erred in issuing a DVPA restraining order on a basis that is statutorily unauthorized by the Family Code. We agree.

A

The trial court prefaced its ruling on the restraining order against father by noting: "Unfortunately, these children are caught between two adults and the adults have not done a good job of keeping the kids out of it. And now it's left to the courts to step in and act as surrogate parents where the parents have, for whatever reason, not been able to deal with that problem. And that's regrettable."

The court went on to explain, "There are two prongs that led to the issuance of the temporary restraining order. The first was the threat to mother's life coming from the father.

"I feel that something was said to cause the child to say that. I believe that the child said it. It came from a reliable source. I found the witness credible in that regard. But because of the child's tender age, I don't know what the motivation was.

"Children hear things but they -- particularly at a very young age, but they don't understand context or meaning. They don't understand the subtleties of our language and emotions.

"So while I think something was said that caused the child to repeat those statements, I'm giving very little weight to that. I don't feel that is reliable enough upon which to base a decision for purpose of this decision. It's there, but on a scale from 1 to 10 in importance in making my decision, it's probably about a 1 or 2. Very little significance.

"And I add to that thus far that there has been no evidence of object[ive] outward behavior by father that would put that at issue.

"The other area, which is the alienation from the mother, I feel has been established.

"I see it as a thread through a number of the reports by the professionals. Obviously, Dr. Burrill states it most strongly. But it's in evidence through the comments of other therapists. But a complete aside from the report, I saw indications of it in other areas.

"[¶] . . . [¶]

"I feel there is evidence that the father is not complying fully with the court orders. There seems at virtually every turn something gets thrown up. Whether it's a financial problem or not signing a form or modifying a form or something, that there is not a commitment to engage in the counseling and reunification program that the Court has laid out.

"There is a tendency of the father to try to establish things on his own terms. He goes to his own doctor for the psych evaluation instead of relying on the neutral court evaluators. He takes the child to an unauthorized therapist instead of going to the court-approved therapist. This is evidence of the desire to control things."

"The child has been removed from the father and is now in a therapeutic program and I'm not going to change that.

"I feel in order to allow for appropriate therapy that it's important that there be no contact with the father for the time being.

"I am satisfied because of the level of animosity between the parents that that conduct will substantially undermine the therapeutic efforts that are taken -- are being taken. And I clearly find this not to be in the child's best interest if that contact is now allowed.

"So I'm going to confirm that sole legal and physical custody of Suraj will be with the mother.

"I will reaffirm all prior orders of the Court. I will reaffirm that there is to be no contact with the child directly or indirectly, that is either directly by the father or through another person or means to the child without Court approval.

"The Court will be interested in learning what the therapists say about that and the progress of therapy so that as soon as is possible the circumstances can be changed so that there can be contact.

"I'm not going to set this order for three years. I'm going to set this order under the current state for one year.

"[¶] . . . [¶]

"And I'm not saying that this order will automatically terminate at the end of one year because, if necessary, it can be continued until the child is 18 years old."

Counsel for mother inquired about the form of the order as follows:

"[Respondent's counsel]: No questions regarding the restraining order. Is it a CLETS order after hearing form,[2] Your Honor?

"THE COURT: Yes."

B

As we noted in part IC, *ante*, questions of statutory interpretation are considered without deference to the trial court's ruling. (*Elsenheimer v. Elsenheimer*, (2004) 124 Cal.App.4th 1532, 1536.) Hence, we review de novo father's argument that the Family Code does not include parental alienation as a basis for a DVPA restraining order.

Section 6203 defines the types of "abuse" for which a DVPA restraining order may issue. The section states, "For purposes

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2 "CLETS" is an acronym for the "Department of Justice . . . computer system, known as the California Law Enforcement Telecommunications System . . . ." (*People v. Martinez* (2000) 22 Cal.4th 106, 113.) To facilitate effective statewide enforcement of DVPA restraining orders, they must be entered into the CLETS database. (See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group rev. #1 2008), ¶ 5:270, pp. 5-110.1 to 5-111.)

of this act, 'abuse' means any of the following: [¶] (a) Intentionally or recklessly to cause or attempt to cause bodily injury. [¶] (b) Sexual assault. [¶] (c) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another. [¶] (d) To engage in any behavior that has been or could be enjoined pursuant to Section 6320."

Section 6320 authorizes the trial court to "issue an ex parte order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members."

"[T]he 'abuse' that may be enjoined under sections 6203 and 6320 is much broader than that which is defined as civil harassment. (Cf. Code Civ. Proc., § 527.6, subd. (b).) Moreover, an order after hearing may enjoin civil harassment only on proof by clear and convincing evidence. (Code Civ. Proc., § 527.6, subd. (d).) This stringent standard of proof does not apply to an order after hearing restraining abuse under the DVPA. (See § 6340, subd. (a).)" (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 334.)

Despite the wide compass given to the trial court to grant DVPA restraining orders, "[j]udicial discretion to grant or deny

an application for a protective order is not unfettered. The scope of discretion always resides in the particular law being applied by the court, i.e., in the '"legal principles governing the subject of [the] action. . . ."' (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297; see *County of Yolo v. Garcia* (1993) 20 Cal.App.4th 1771, 1778 ['range of judicial discretion is determined by analogy to the rules contained in the general law and in the specific body or system of law in which the discretionary authority is granted'].)" (*Nakamura v. Parker*, *supra*, 156 Cal.App.4th at p. 337.)

A trial court abuses its discretion when "deciding [the] case on facts entirely irrelevant to the [DVPA], the purpose of which is not to mandate that parents live with their children, but to 'prevent the recurrence of acts of violence and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the *violence*.' ([]§ 6220.)" (*Quintana v. Guijosa* (2003) 107 Cal.App.4th 1077, 1079, italics and second brackets added.)

Here, the trial court's attachment to the restraining order shows that the court did not rely on mother's allegations of domestic violence by father in 1996 and 1997. Instead, the attachment notes the trial court's sole basis as the "alienation of Suraj Nair from his mother by his father . . . ." However, emotional alienation is not a type of "abuse" for which sections 6203 or 6320 allow issuance of a DVPA restraining order. (*Quintana v. Guijosa*, *supra*, 107 Cal.App.4th at p. 1079.) By

relying on a statutorily unauthorized basis for issuing the restraining order, the trial court exceeded the bounds of its discretion. (*Nakamura v. Parker*, *supra*, 156 Cal.App.4th at p. 334.)

Mother urges us to affirm the trial court's issuance of the restraining order because it comports with Suraj's best interests. In this case, the evidence shows that mother's efforts to reunify with Suraj were continually frustrated by father. Children's best interests usually require that they have frequent and continuing contact with their parents. (See, e.g., § 3020, subd. (b) ["The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing"]; § 3040, subd. (a)(1) ["In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent"]; see also *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 36.)

Although the best-interest-of-the-child standard governs many family law custody decisions, it does not apply to DVPA restraining orders. Absent a showing of abuse as defined in sections 6203 and 6320, a DVPA restraining order must be reversed. (*Quintana v. Guijosa*, *supra*, 107 Cal.App.4th at p. 1079.) We express no opinion with respect to whether the trial

court may rely on a source of law other than the DVPA to enter the orders that it did.

Mother also emphasizes the evidence that father committed acts of domestic violence in 1996 to 1997, and that the therapists in this case expressed grave concerns for mother's safety due to father's anger issues. Had the trial court based the restraining order on these factors, it is possible that we would affirm. Domestic violence combined with a present showing of dangerousness to the safety of mother and her children *are* the sort of evidence that support a restraining under the DVPA. (§ 6203, subds. (a) & (c).)

Here, the trial court's attachment to the DVPA restraining order establishes that the order was based entirely on father's contribution to Suraj's emotional alienation from his mother. The order states in pertinent part:

"2. The court finds that alienation of Suraj Nair from his mother by his father has been established by the evidence in this case. The evidence on which the court relies is contained in the reports of Dr. Burrill and the comments of other court-appointed therapists in this case, as well as the following evidence: testimony of Kelly Graham regarding the child's extreme reaction to mother's presence on the child's school campus; evidence of father not fully complying with court orders reflecting a lack of commitment to engage in the counseling and reunification program laid out by the court; evidence of father's desire to control things by taking Suraj to an unauthorized therapist, by using father's own doctor for a

psychiatric evaluation instead of relying on neutral court evaluators, by extremely inappropriate conduct in having Suraj pay for his own counseling sessions, and by evidence that father has not undertaken any supervised visitation with Sujay Nair.

"3. The court reaffirms that it is not in the best interests of Suraj Nair for father to have any contact at this time. The court finds that contact between father and Suraj will substantially undermine the therapeutic efforts that are being undertaken. The court clearly finds that contact by father with Suraj is not in the child's best interests. The court further finds that it would be detrimental to Suraj's interests if contact by father with Suraj was allowed. This order for 'no contact' means direct or indirect contact -- either directly by father, or indirectly with the child through another person or means, without court approval."

Although the trial court's colloquy with counsel prior to the issuance of the restraining order noted that the threat to mother's life reported by Sujay carried "very little weight," the restraining order itself fails to mention the threat as a basis for its issuance. Instead, the trial court's order relied *solely* on the parental alienation rationale in barring any contact between father and son for two years.

At oral argument, mother's counsel urged us to affirm the DVPA restraining order by following *Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483 (*Nadkarni*). Specifically, mother argued that *Nadkarni* holds that a threat to the "peace of mind" of a

former spouse suffices as a basis for a DVPA order. We find *Nadkarni* distinguishable.

In *Nadkarni, supra*, 173 Cal.App.4th 1483, Darshana sought a DVPA restraining order against her former husband, Datta, after he accessed her e-mail account. Her application for a restraining order alleged that Datta had spent 20 days in jail after he beat her, and that she feared his access to her e-mail would compromise her safety by informing him of calendared events at which he could confront and attack her. (*Id.* at p. 1490.) Darshana also alleged that her e-mail account contained confidential communications with her family law attorney and sensitive e-mails with her business clients. (*Id.* at p. 1489.) Thus, Datta's continued access to her e-mail was asserted to compromise the attorney-client relationship as well as giving him the ability to embarrass her with her clients. (*Id.* at pp. 1489-1490.) The trial court ruled that the allegations were insufficient to secure a DVPA restraining order and granted husband's motion for judgment on the pleadings. (*Id.* at pp. 1492-1493.)

The Court of Appeal reversed, holding that Darshana's allegations -- if proven -- would suffice as a basis for a DVPA restraining order. (*Nadkarni, supra*, 173 Cal.App.4th at pp. 1498-1499.) The *Nadkarni* court noted that section 6320, which defines some of the conduct for which a DVPA restraining order may be issued, "provides that 'the requisite abuse need not be actual infliction of physical injury or assault.'" (*Id.* at p. 1496, quoting *Conness v. Satram* (2004) 122 Cal.App.4th 197,

202.) Instead, section 6320 "broadly provides that 'disturbing the peace of the other party' constitutes abuse for purposes of the DVPA." (*Id.* at p. 1497.) Consistent with this definition, the *Nadkarni* court held that accessing, reading, and publicly disclosing Darshana's e-mails sufficed to warrant DVPA protection. (*Id.* at p. 1498.) Moreover, Datta's learning of the contents of the e-mails caused Darshana "to fear the destruction of her 'business relationships,' and to fear for her safety." (*Id.* at p. 1499.)

We are not presented with an invasion of a legal privilege, destruction of valuable business ties, public embarrassment, or fears for personal safety as the basis for the DVPA order in this case. As we have noted, the *sole* basis for the restraining order was father's conduct in alienating Suraj against his mother.

Here, the DVPA order's primary goal was not to separate a harasser from a victim, but a father from a son who was neither threatened nor harassed by his father. Rather than keeping a harasser at bay, the DVPA order in this case was intended to compel Suraj to be *with* his mother. So purposed, the restraining order turned the intent of the DVPA on its head by forcing reunification rather than protecting a beleaguered party from harassment.

As we have explained, emotional alienation is not a basis for a restraining order under the DVPA. (§§ 6203, 6320.) Consequently, we reverse the March 25, 2009, restraining order.

CONCLUSION

"When elephants fight, the grass suffers." -Kenyan Proverb (http://www.kenya-advisor.com/kenya-proverbs-2.html [as of Mar. 4, 2010].)

Escalating acrimony and litigiousness over matters of custody, visitation, and support are not good for the children. The parties must recognize this. Although we reverse the DVPA restraining orders, we affirm the basic principle that parents should act in the best interests of their children.

We are sympathetic in the extreme with the efforts of the trial court to modify Father's unacceptable behavior toward his son(s). But, like any other litigant, Father is entitled to have the rule of law applied to his case.[3]

DISPOSITION

The December 11, 2008, order is reversed insofar as it denies appellant Jayraj Nair's request for reimbursement of Bindu Nair's share of expenses incurred for Suraj's education-related activities. The order of December 11, 2008, is otherwise affirmed. The Domestic Violence Prevention Act restraining order granted on March 13, 2009, and filed on

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[3] Our time to work on this appeal has been truncated by a request by the California Supreme Court to deliver large portions of the record to it so it can review a prior appeal in this case. Thus, while we are confident as to the legal results in this case, we have not had time to put this opinion in a form suitable for publication. That is why the opinion is filed unpublished.

March 25, 2009, is reversed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

SIMS, Acting P. J.

We concur:

RAYE, J.

HULL, J.